



## Financial Markets Law Committee (“FMLC”)

### Banking Scoping Forum

Date: Tuesday 14 December 2021

Time: 2.00pm to 3.00pm

Virtual meeting

#### Attendees:

Ferdisha Snagg (Moderator)

James Bresslaw

Mark Kalderon

Jons Lehmann

Dorothy Livingston

Charles Proctor

Julia Smithers Excell

Jeremy Stokeld

Cleary Gottlieb Steen & Hamilton LLP

Simmons & Simmons LLP

Freshfields Bruckhaus Deringer LLP

Fried, Frank, Harris, Shriver & Jacobson LLP

Herbert Smith Freehills LLP

Fladgate LLP

White & Case LLP

Linklaters LLP

Chhavi Sinha

FMLC Secretariat

**Registered Charity Number: 1164902.**

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## Minutes:

### 1. Introductions

- 1.1. Ms Snagg opened the meeting.

### 2. Forward Schedule for Banking Scoping Forum (Chhavi Sinha)

- 2.1. Ms Sinha asked members to consider the forward schedule of meetings for 2022, circulated ahead of the meeting, and let the Secretariat know of any concerns.

### 3. European Commission's proposal on Capital Requirements Directive and Capital Requirements Regulation, the CRD6/CRR3 package (Ferdisha Snagg)<sup>1</sup>

- 3.1 Ms Snagg provided an overview of the European Commission's proposal on Capital Requirements package. A copy of her presentation is attached in Appendix 1. Ms Snagg explained that the E.U. proposals are aimed at ensuring that E.U. banks are more resilient to potential future economic shocks. In particular, one of the main aims of the package is to implement the final Basel III provisions. She emphasised the relevance of Third Country Bank proposals and highlighted certain related issues of legal uncertainties such as questions concerning the scope of the list of activities in Annex 1 of the Capital Requirements Directive. Members anticipated that industry groups representing non-E.U. banks would likely raise issues with the proposed policy but it was not felt at this stage that the FMLC should raise the legal issues with the proposal.

### 4. FCA's Second Consultation on a new consumer duty (Mark Kalderon)<sup>2</sup>

- 4.1. Mr Kalderon provided a background of the consultation and invited members to comment on any issues of legal uncertainty emanating from the new Principle 12 or the overall consultation for the FMLC to address. He emphasised on the proposal of Private Right of Action ("PROA") which is currently not applicable however might come in force in the future. He noted that PROA (when applicable) might create uncertainty as Principle 12 is broad and vague. Members discussed several instances of the application of new consumer duty (including acting in good faith) in the context of banking. A Member noted that a degree of uncertainty is inevitable in consumer legislation and that at this stage, it might not be suitable for the FMLC to intervene, at least while no private right of action was being

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<sup>1</sup> European Commission: Banking package (27 October 2021), available at: [https://ec.europa.eu/info/publications/211027-banking-package\\_en](https://ec.europa.eu/info/publications/211027-banking-package_en)

<sup>2</sup> FCA, Consultation Paper CP21/36, (December 2021); available at: [A new Consumer Duty: Feedback to CP21/13 and further consultation \(fca.org.uk\)](https://www.fca.org.uk/publications/consultation-papers/CP21-36)

proposed. Other bodies such as the City of London Law Society are likely to comment on the consumer duty and the FMLC could consider in due course whether to support the points they make to the extent they go to legal uncertainty.

4.2. Members concluded that no issues of legal uncertainty arise from the proposal.

## **5. Any other business**

5.1 A member informed others that a working group established by the City of London Law Society to examine the National Security and Investment Act 2021, is in the process of finalising a recommendation to Department for Business, Energy and Industrial Strategy and HM Treasury. The working group has identified issues of legal uncertainty (which may also be relevant for the FMLC to address). The member offered to share the report with the Secretariat in due course.